BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

IN THE SUPREME COURT OF THE UNITED STATES

KING COUNTY, a municipal corporation, RALPH S. STACY, as Treasurer of King County, and ROY B. MISENER, as Assessor of King County,
Petitioners,
vs.
W. J. LAKE & COMPANY, INC., a corporation,
Respondent.

I.

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of the State of Washington is reported in 103 Wash. Dec. 430, 101 Pac. (2d) 357. A further ruling on the matter of costs (not involved in this case) is reported in 104 Wash. Dec. 597, 104 Pac. (2d) 599.

II.

JURISDICTION

1. The date of the judgment to be reviewed is August 14, 1940.

2. The statutory provision which is believed to sus-

tain the jurisdiction of this court is Judicial Code, Section 237 (b).

3. The facts showing that the nature of the case is such as to bring it within the judicial provision relied upon are as follows:

The State statute (Remington Revised Statutes of Washington § 11111) provides for the taxation of all real and personal property. Such statute was held repugnant to the Interstate Commerce clause of the Federal Constitution, insofar as it would permit the taxation of the liquor here involved.

The petitioners were parties to this cause in the Supreme Court of the State of Washington which rendered a judgment affirming the decision of the Superior Court of the State of Washington for King County (R. 79, 85).

4. The cases believed to sustain jurisdiction are as follows:

Minnesota v. Blasius, 290 U. S. 1, 10, 54 S. Ct. 34, 78 L. ed. 131;

Hughes Bros. Co. v. Minn., 272 U. S. 469, 476, 47 S. Ct. 192, 71 L. ed. 362;

Carson Pet. Co. v. Vial, 279 U. S. 95, 49 S. Ct. 292, 73 L. ed. 626;

Gen. Oil Co. v. Crain, 209 U. S. 211, 28 S. Ct. 475, 52 L. ed. 754;

Bacon v. Illinois, 227 U. S. 504, 33 S. Ct. 299, 57 L. ed. 615;

Susquehanna Coal Co. v. South Amboy, 228 U. S. 665, 33 S. Ct. 712, 57 L. ed. 1015.

III.

STATEMENT OF THE CASE

This has already been stated in the preceding petition, commencing at Page 1 and is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERROR

1. The Court erred in holding that Article I, Section 8, of the Constitution of the United States, should be so construed as to render the liquor owned by the respondent immune from state taxation.

V.

ARGUMENT

POINT A

The fact that Seattle was a convenient distributing point and that the liquor came to Seattle in large shipments consigned to respondent to be divided for transshipment, indicates that the transit had been broken.

POINT B

The fact that respondent had no orders for 10 to 15 percent of the liquor coming to Seattle shows that this liquor was not in interstate commerce.

POINT C

Many sales or transfers were made to other liquor dealers at Seattle for shipment outside the State; sales were made to officers' clubs on government reservations within the State; sales were

made to ships in the Seattle harbor; and at least once liquor from this stock was sold to the Washington State Liquor Control Board. These transactions demonstate that the respondent was engaged in a business at Seattle and that its property is not immune from State taxation.

POINT A

THE FACT THAT SEATTLE WAS A CONVENIENT DISTRIBUTING POINT AND THAT THE LIQUOR CAME TO SEATTLE IN LARGE SHIPMENTS CONSIGNED TO RESPONDENT TO BE DIVIDED FOR TRANSSHIPMENT, INDICATES THAT THE TRANSIT HAD BEEN BROKEN.

The testimony shows that Seattle is a convenient point for distributing the respondent's liquor to Alaska, Idaho, Montana and Utah (R. 37); that large shipments sent to respondent at Seattle are divided up for reshipment to these outside places (R. 15). While stored at Seattle, the liquor was segregated according to brand (R. 31). When shipped out the destination was stenciled on the boxes (R. 32).

These facts bring the case within the authority of:

American Steel and Wire Co. v. Speed, 192 U. S. 500, 24 S. Ct. 365, 48 L. ed. 538;

General Oil Co. v. Crain, 209 U. S. 211, 28 S. Ct. 475, 52 L. ed. 754;

Bacon v. Illinois, 227 U. S. 504, 33 S. Ct. 299, 57 L. ed. 615;

Susquehanna Coal Co. v. South Amboy, 228 U. S. 665, 33 S. Ct. 712, 57 L. ed. 1015;

Champlain Realty Co. v. Brattleboro, 260 U. S. 366, 43 S. Ct. 146, 67 L. ed. 313;

Minnesota v. Blasius, 290 U. S. 1, 54 S. Ct. 34, 78 L. ed. 131;

McGoldrick v. Berwind-White Coal Co., 84 U. S. Adv. Ops. 343.

In *American Steel and Wire Co. v. Speed,* 192 U. S. 500, 24 S. Ct. 365, 48 L. ed. 538, the bill alleged substantially that the company resisting the tax was a New Jersey corporation having its place of business in Chicago. To facilitate sale and delivery of its products, it selected Memphis, Tennessee, as a distributing point. Goods were consigned to the Steel Company in Memphis, but a transfer company was engaged at that point to take charge of the products, store them, assort them, and to make deliveries to persons designated by the Steel Company. It was further alleged that the goods in the warehouse in Memphis were merely in transit from the point of manufacture outside the State of Tennessee to the persons to whom they had been previously sold. On this theory, the levy of a tax by the State of Tennessee was charged to be repugnant to the commerce clause of the Constitution of the United States.

The testimony showed that of the mass of goods on hand in Memphis, about 90% ultimately goes to jobbers outside of Memphis and beyond the limits of the State. The remaining 10% goes to Memphis jobbers.

Complainant endeavored to secure contracts covering its output before the goods were manufactured, but it did not always do so. Many times it took advantage of a good stage of water in the rivers in floating its products to Memphis, and thereupon massed its goods at the latter point in anticipation of future sales.

Mr. Justice White delivered the opinion of the court, and in sustaining the tax, said at page 518:

> "'The testimony shows that Memphis has within recent years, become, by reason of its accessability to railway and river transportation, a great distributing point; and it was selected as the basis of the operations which are the subject of the present controversy, by reason of these exceptional advantages. * * *.'
>
> "With these facts in hand, we are of opinion that the court below was right in deciding that the goods were not in transit, but, on the contrary, had reached their destination at Memphis, and were there held in store at the risk of the Steel Company, to be sold and delivered as contracts for that purpose were completely consummated. All questions, therefore, as to the power of the state to levy the merchant's tax based on the contrary contention, being without merit, may be put out of view."

In *General Oil Co. v. Crain,* 209 U. S. 211, 28 S. Ct. 475, 52 L. ed. 754, the plaintiff was a Tennessee corporation, operating oil wells in Ohio and Pennsylvania. The oil was shipped to Memphis, Tennessee, in tank cars and there transferred to oil storage tanks,

which were marked, (1) "Oil already sold in Arkansas, Louisiana and Mississippi"; and (2) "Oil to be sold in Arkansas, Louisiana, and Mississippi." The proof showed that all of the oil was intended for and used in filling orders obtained outside the State of Tennessee, and that the oil in storage tanks designated as "oil already sold in Arkansas, Louisiana, and Mississippi," remained in Tennessee only a few days in which to be properly distributed according to orders. Tennessee had enacted an inspection law requiring an inspection tax of twenty-five cents per barrel on all such oil. The Supreme Court considers this charge as a tax rather than a regulation under the police power of the State. The court held all of the oil taxable, saying at page 230:

> "Like comment is applicable to plaintiff in error and its oil. The company was doing business in the state, and its property was receiving the protection of the state. Its oil was not in movement through the state. It had reached the destination of its first shipment, and it was held there not in necessary delay or accommodation to the means of transportation, as in *State Etc. v. Engle, supra,* but for the business purposes and profit of the company. *It was only there for distribution, it is said, to fulfil orders already received. But to do this required that the property be given a locality in the state beyond a mere halting in its transportation. It required storage there — the maintenance of the means ofstorage; of putting it in and taking it from storage.* The bill takes pains to allege this. 'Complainant shows that it is impossible in the

coal oil business, such as complainant carries on, to fill separately each of these small orders directly from the railroad tank cars, because of the great delay and expense in the way of freight charges incident to such a plan, and for the further reason that an extensive plant and apparatus is necessary in order to properly and conveniently unload and receive the oil from said tank cars, and it would be impracticable, if not impossible, to have such apparatus and machinery at every point to which complainant ships said oil.'

"This certainly describes a business — describes a purpose for which the oil is taken from transportation, brought to rest in the state, and for which the protection of the state is necessary, a purpose outside of the mere transportation of the oil. The case, therefore, comes under the principle announced in *American Steel and Wire Company v. Speed,* 192 U. S. 500." (Emphasis supplied).

In *Susquehanna Coal Co. v. South Amboy,* 228 U. S. 665, 33 S. Ct. 712, 57 L. ed. 1015, the plaintiff was a Pennsylvania company which shipped coal from Pennsylvania to the New Jersey tide water port of South Amboy. Upon its arrival at South Amboy it was loaded into bottoms, if the same were available, for shipment to New York. If bottoms were not available, the coal was stored in the Coal Company's yard at South Amboy to be used to fill orders obtained later. All of the coal was eventually shipped out of the State. The court held the coal in the yard taxable by the State of New Jersey, saying at page 669:

"It is clear, we repeat, that such trade could only be accommodated through the storage of coal somewhere, and plaintiff in error availed itself of the conditions to put the storage in New Jersey.

"The coal, therefore, was not in actual movement through the state; it was at rest in the state, and was to be handled and distributed from there. Therefore, the principles expressed in *General Oil Co. v. Crain,* 209 U. S. 211 and *Bacon v. Illinois,* 227 U. S. 504, are applicable to it. The products in neither of those cases were destined for sale in the states where stored; the delay there was to be temporary, a postponement of their transportation to their destinations. *There was, however, a business purpose and advantage in the delay which was availed of, and while it was availed of, the products secured the protection of the state.* In both cases it was held that there was a cessation of interstate commerce and subjection to the dominion of the state." (Emphasis supplied).

In *Minnesota v. Blasius,* 290 U. S. 1, 54 S. Ct. 34, 78 L. ed. 131, the respondent Blasius, cattle trader, owned and had in his possession, eleven head of cattle which were assessed as his peronal property, under the general tax laws of the state. The eleven head of cattle came to the yards in Minnesota, from some point outside the state of Minnesota. The cattle were consigned to a commission firm at South St. Paul, the consignors having no intent to transport said cattle to any other place than South St. Paul nor did they have any intent that such cattle should be transported to any particu-

lar place after their sale. The cattle were sold to a trader on the day before the tax date were owned by the trader on the tax date, and had not been entered with any carrier for shipment to any point, but were offered for sale on the open market. Part of the cattle were sold and shipped on the tax date and the remainder the next day. Non-residents were the purchasers in both instances.

Chief Justice Hughes delivered the opinion of the court and in holding that the cattle were not immune from taxation by the state, said at page 8:

> "The states may not impose direct burdens upon interstate commerce, that is, they may not regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains. This limitation applies to the exertion of the State's taxing power as well as to any other interference by the State with the essential freedom of interstate commerce. Thus the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it. Similarly, the states may not tax property in transit in interstate commerce. But by reason of a break in the transit, the property may come to rest within a state and become subject to the power of the state to impose a non-discriminatory property tax."

And again at page 10 of the same opinion, the court said:

> "Where property has come to rest within a state, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the state or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the state and is thus subject to its taxing power."

The court thereafter quotes approvingly from the case of *Bacon v. Illinois,* 227 U. S. 504, 33 S. Ct. 299, 57 L. ed. 615, and states that the case of *Blasius* is a stronger one for the State tax than that of *Bacon.* The court quotes, at page 12:

> "In *Champlain Co. v. Brattlesboro, supra,* at page 375,the court thus restated the point of the *Bacon* case: 'His storing of the grain was not to facilitate interstate shipment of the grain or save it from the danger of the journey.' 'He made his warehouse a depot for its preparation for further shipment and sale. He had thus suspended the interstate commerce journey and brought the grain within the taxable jurisdiction of the state'."

POINT B

THE FACT THAT RESPONDENT HAD NO ORDERS FOR 10 TO 15% OF THE LIQUOR COMING TO SEATTLE SHOWS THAT THIS LIQUOR WAS NOT IN INTERSTATE COMMERCE.

The respondent ordinarily purchases 10 to 15% more liquor than it has orders on hand. This liquor is used to fill orders subsequently obtained (R. 15, 16). There was evidently no attempt made to segregate this

"overburden" from the remainder. We think this fact makes all of the liquor taxable. United States Supreme Court authority upon the effect of an "over burden" seems lacking, but where property was held immune from taxation the court carefully pointed out that advance orders were held for all the goods sought to be taxed.

> *Carson Pet. Co. v. Vial,* 279 U. S. 95, 49 S. Ct. 292, 73 L. ed. 626.

The precise question was presented to the Supreme Court of Iowa in *Merchant's Transfer Co. v. Board of Review,* 105 N. W. 211, 128 Iowa 732, wherein the court said, at page 212:

> "The goods when assessed were not in actual transit. They had been deposited in appellant's warehouse, not as a mere incident to their carriage but to facilitate a distribution thereafter to be made. Their further movement had not been delayed by accident or casualty of any kind, or by reason of any 'lack of facilities for immediate transportation.' They came into appellant's possession not as one of a succession of carriers between consignor and consignee, but appellant was itself the consignee and agent of the consignor, to receive, store, keep, and thereafter, upon orders from the consignor, to make distribution among its customers.
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> "It would require a most violent perversion of the plain, ordinary meaning of the words to say that goods so held are, in any just sense, 'in transit.' The shipments had reached their destination for the time being and become a part of the general property of the state."

See also *American Steel and Wire Co. v. Speed,* 192 U. S. 500, 24 S. Ct. 365, 48 L. ed. 538.

POINT C

MANY SALES OR TRANSFERS WERE MADE TO OTHER LIQUOR DEALERS AT SEATTLE FOR SHIPMENT OUTSIDE THE STATE; SALES WERE MADE TO OFFICERS' CLUBS ON GOVERNMENT RESERVATIONS WITHIN THE STATE; SALES WERE MADE TO SHIPS IN THE SEATTLE HARBOR; AND AT LEAST ONCE LIQUOR FROM THIS STOCK WAS SOLD TO THE WASHINGTON STATE LIQUOR CONTROL BOARD. THESE TRANSACTIONS DEMONSTRATE THAT THE RESPONDENT WAS ENGAGED IN A BUSINESS AT SEATTLE AND THAT ITS PROPERTY IS NOT IMMUNE FROM STATE TAXATION.

Respondent is but one of several companies doing a similar business at Seattle. If another concern was short on a particular brand of liquor the respondent would on request transfer the needed liquor from its stock to such concern (R. 22, 23, 25, 47, 54, 55, 56, 57, 58, 62, 63). The transfer would be accomplished at the storage warehouse and the purchaser would pay the respondent for the liquor (R. 23). The record shows numerous sales of this type (R. 54, 55, 56, 57, 58). Sales were made to the officers' headquarters at Bremerton, Washington (R. 62, 63), and to ships' stores at Seattle (R. 56, 62, 63). One sale of 250 cases of gin to the Washington State Liquor Board was shown (R. 57).

We submit that this describes a business whose property is subject to a non-discriminatory state ad valorem tax.

In *Minnesota v. Blasius,* 290 U. S. 1, 54 S. Ct. 34, 78 L. ed. 131, Chief Justice Hughes said, at page 10:

> "Where property has come to rest within a state, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the state or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power."

Other pertinent authorities are:

> *American Steel and Wire Co. v. Speed,* 192 U. S. 500, 24 S. Ct. 365, 48 L. ed. 538;
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> *Bacon v. Illinois,* 227 U. S. 504, 33 S. Ct. 299, 57 L. ed. 615;
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> *Susquehanna Coal Co. v. South Amboy,* 228 U. S. 665, 33 S. Ct. 712, 57 L. ed. 1015;
>
> *McGoldrick v. Berwind-White Coal Co.,* 84 U. S. Adv. Ops. 343.

Bacon v. Illinois, 227 U. S. 504, 33 S. Ct. 299, 57 L. ed. 615, held certain grain taxable because the owner had the power to dispose of the grain within the State of Illinois, although actually it was held within that State only temporarily before being transported to points outside Illinois. The court says with reference to the owner, at page 516:

"He might sell the grain in Illinois or forward it as he saw fit. It was in his possession with the control of absolute ownership. He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago for his own benefit and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the State in an assessment for taxation which was made in the usual way without discrimination."

Each of the other cases above cited was decided in accord with the rule enunciated in the *Bacon* case, but we quote only from the latter case because it is perhaps better known than the others.

CONCLUSION

The respondent is doing business at a point convenient for the distribution of liquor to Alaska, Utah, Idaho and Montana. It orders 10 to 15% more liquor than is necessary to fill the orders on hand. It makes many sales to other dealers, to officers' clubs and ships' stores within the State of Washington.

All of these facts demonstrate that the Supreme Court of the State of Washington was in error when it decided that the interstate commerce clause of the Federal Constitution rendered the liquor immune from

State taxation. The Writ of Certiorari should be granted so that the result of this cause will conform to that reached in so many other cases decided by the Supreme Court of the United States.

Respectfully submitted,

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